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Book Reviews

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Book Reviews

FEDERAL JUDGES: THE APPOINTING PROCESS. By *Harold W. Chase*.† Minneapolis: University of Minnesota Press. 1972. Pp. xiii, 240. \$10.00.

In the mid 1940's Judge Charles Alvin Jones of the Third Circuit Court of Appeals resigned to become a justice of the Pennsylvania Supreme Court. The reason for his decision was clear. It was better to be the final arbiter of the law in Pennsylvania than to be on an intermediate appellate court in the federal system. Not too long ago, a federal district judge in Pennsylvania, was offered an appointment to the Pennsylvania Supreme Court. His response was "Why should I give up a life-time prestigious position to accept appointment to a state supreme court?" Obviously, a lot has changed since Justice Jones' decision.

At one time, the federal courts were of limited jurisdiction and authority and the states in their individual sovereignty were supreme. With the advent of the alphabet agencies under the Roosevelt administration, increased executive power, and the extensive participation of the federal government in our economy and in our society, the relationship of the state court system to the federal court system changed drastically. It has now reached the point where it is possible to try a man for the violation of a Pennsylvania law, find him guilty, conclude at the state supreme court level that no state or federal constitutional right was violated and for that man to go down the street to a federal district court, file a petition for habeas corpus and, in effect, have a federal district judge overrule the final decision of the Supreme Court of Pennsylvania. Can there be any wonder then that my colleague decided to stay on the federal district court?

The aggrandizing to the federal government and concomitantly the federal judiciary of pervasive power saps the strength of the individual states and renders the state judiciary perhaps at best an appendage to the federal system. Given the fundamental principle of separation of powers, the theoretical base of the tenth amendment which has largely been ignored in the development of our constitutional history, and the fundamental belief of our founding forefathers that state authority

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was important authority, we should lament the decline of state power. Of course, the integrated nature of our economy, and the interdependence of our society necessitated the involvement of the federal government. Rightly or wrongly, persons in West Virginia are dependent upon persons in Idaho or in California or in Pennsylvania. The federal system offers, therefore, a unifying force in the operation of government. Nonetheless, one can accept and applaud the development of federal authority and its unifying force while at the same time lamenting the precipitious decline of state court authority.

Since we have conceded to the federal system much of the decision making authority that rests in organized government, Professor Chase's book on the appointing process of federal judges becomes potentially terribly important. We should be and must be concerned about how the persons to whom we have vested this authority are chosen and that is what Professor Chase has set out to explain.

Federal judges are appointed by the President by and with the advice and consent of the Senate. Since Washington's administration there has existed a practice called senatorial courtesy. The senator(s) of the President's party of the state in question either nominates or must be consulted prior to the appointment of a federal judge. Thus it is extraordinarily difficult for the President to appoint someone over the expressed objection of a senator from his party from the particular state where the vacancy exists. However, "the senator just can't state a few magical words like "personally obnoxious" and get away with it. He must be prepared to fight and give his reasons for opposing the nominee. If his reasons are not persuasive to other senators, or if he is not a respected member of the Senate, he stands a chance of losing his fight."¹

There are a number of parties who participate in the appointing process. Historically, the President relies upon his attorney general to advise him concerning judicial appointments. The attorney general in turn has delegated the staff function—researching and checking out prospective nominees—to the deputy attorney general. Thus, as Professor Chase points out, "the deputy plays the leading role in exercising the President's power with respect to making appointment to the federal bench."²

Since 1946, the American Bar Association has had a special commit-

1. H. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 7 (1972).

2. *Id.* at 18.

tee on the federal judiciary. The purpose of this committee is to pass on qualifications of nominees to the federal bench. After its investigation, the committee states whether a person is "exceptionally well qualified," "well qualified," "qualified," or "not qualified" for a particular judicial position. Given that Presidents like to make popular appointments it is difficult for a President to appoint a man who has been deemed by the American Bar Association Judiciary Committee as "not qualified". Since its inception, the committee has enjoyed the support of the editorial writers of the nation. However, Chase argues that the committee's alleged unbiased, nonpartisan judgment has been greatly overstated.

Chase points out that the Eisenhower administration enjoyed a good reputation and, in general, its appointments were applauded by the press. Whereas, the Kennedy, Johnson, and Truman administrations did not receive the same amount of favorable press. However, Chase concludes that in essence, the Kennedy and Eisenhower administrations were more alike than dissimilar and that the only significant difference in the approach of the two administrations was the weight given the recommendation by the American Bar Association Committee on the Federal Judiciary.

He refers, however, to another significant difference between the Kennedy and Eisenhower administrations. It was Eisenhower's belief that the best man should be appointed to the court regardless of race, creed, color, national origin, or background. He felt no particular responsibility to compensate minority groups whatever their makeup for past discriminations. In fact, President Eisenhower found it very distasteful that race or religion would be considered in making a determination of a nominee's qualifications for appointment. This is in contrast to the Kennedy administration that believed in what would now be called affirmative action. They deliberately set out to make the federal judiciary more representative of the various ethnic and religious groups which make up the United States.

Chase concludes his study by making an examination of the Johnson administration judicial appointments. "Twenty-three percent of the district judges appointed by Johnson and thirty percent of the court of appeals judges appointed by Johnson were graduates of Ivy League law schools. In comparison, twenty-one percent of the district judges and twenty-nine percent of the court of appeals judges appointed by Eisenhower were graduates of Ivy League law schools. Eighteen

percent of the district judges and nineteen percent of the appellate court judges appointed by Kennedy were graduates of Ivy League law schools."³ Given the circumstances under which Johnson came to power and the nature of his educational origins, we should not be surprised that he would have a marked bias towards Ivy League law school graduates. Johnson's teachers college training, his southern background and his folksy ways are not the kinds of things that endear politicians to the editorial writers of this country.

Professor Chase ends his book with two proposals. One entitled "a modest proposal" calls for the senators to give up their senatorial prerogatives in pushing candidates for the federal bench. Probably correctly he states that it is unlikely senators would be willing to give up the custom of senatorial courtesy. His more radical proposal called "a less modest proposal" would lodge the judicial selection power for federal judges below the Supreme Court in the Supreme Court of the United States. Professor Chase quotes article III as stating "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, the Courts of Law, or in the Heads of Departments."⁴ It is Professor Chase's belief that the Supreme Court is less likely to be political and consequently would make purely professional judgments as to the capabilities of prospective nominees. He likens the appointment of a member of the court to the appointment to the faculties of the great universities. It shocks him that out of the forty federal judges he contacted, he received no enthusiastic response and one-half of them were strongly opposed on the basis that the court was already overburdened and they feared a self perpetuating oligarchy.

Professor Chase concludes, "If we aspire to excellence the only hope is a radical departure from the present system to one in which selection is made the responsibility of the Supreme Court. I am aware of the predictable reluctance of the Senate and the President to give up political power, but that should not preclude discretion and debate over the merits of the proposal."⁵

Professor Chase suggests that inferior court judges be appointed by the judges of the Supreme Court with little supporting constitutional authority. First, he is factually wrong when he states that article III

3. *Id.* at 180

4. *Id.* at 205.

5. *Id.* at 208.

provides that Congress shall or may by law "vest the Appointment of such inferior Officers as think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Actually that language is found in article II, section II, clause 2 describing the powers of the President. Therefore, there is a serious question as to what is meant by "inferior officers." Article III, section I states, "the judicial Power of the United States shall be vested in one supreme Court and such inferior Courts as the Congress may from time to time ordain or establish." When the founding fathers used the words "inferior courts" is that to be read the same as "inferior officers" or more particularly, is a federal district judge an "inferior officer?" The author fails to point to any precedent for his suggestion—can the President constitutionally delegate the judicial appointment power to the Supreme Court?

Secondly, Professor Chase assumes that a judiciary appointed by the Supreme Court would somehow be better than one appointed by the President. As one who has participated in the faculty selection process, I have not been impressed that the quality of selection of a particular faculty is necessarily enhanced by the participation of peers. The quality of that faculty will be determined by the quality of the people who participate in the process. Finally, there is serious question as to whether or not the close shop nature of university life should be perpetrated upon the public at large without it having some recourse.

This is a modest book of modest scholarship and of modest impact. The information which it gives to us is not particularly enlightening. The recommendations which it gives are interesting perhaps but not apparently well thought through or documented. I picked up this book with the thought that I would gain a real insight into the federal appointing process. What I discovered is that it is a political process which I already knew; that the attorney general participates in the process which I already knew; that there was something called senatorial courtesy which I already knew and that the American Bar Association Committee on the Judiciary played an important role which I already knew. I am not at all convinced that the level of sophistication of political scientists is such that they would not already understand this process. To the extent that this material is made available to lay people perhaps it can be helpful. Thus, we have a book which states the obvious with a radical unsupported recommendation. I think Professor Chase had an excellent idea. I regret he did not make it work.

RONALD R. DAVENPORT*

CORPORATE LIB: WOMEN'S CHALLENGE TO MANAGEMENT. Edited by *Eli Ginzberg*[†] and *Alice M. Yohalem*.^{††} Baltimore: Johns Hopkins University Press, 1973. Pp. x, 153. \$2.50.

So much has been written within the last decade on the status of women that this reviewer is almost reluctant to add to the verbiage. As universities have established divisions of women's studies, university and other publishers¹ have been examining and re-examining women collectively, singly, historically, psychologically, anthropologically and argumentatively as if women were a new phenomena in our society.

Corporate Lib: Women's Challenge to Management, edited by Eli Ginzberg, Director of the Conservation of Human Resources Project at Columbia University and Alice Yohalem, a Senior Research Associate with the Project, falls into the above category and is a compendium of articles prepared for and delivered at a conference sponsored by the Graduate School of Business of Columbia University, at Arden House, New York, in the fall of 1971 and aimed specifically to corporate and business management. The participants and subsequent contributions to the edited volume include educators and sociologists, as well as corporate executives, conversant or concerned with upward mobility for the woman worker and with corporate personnel practices and problems. The crux of these discussions is the "hows" and "whys" of integrating women into the management structure, the obstacles to such integration and the adjustments that must be made if stereotyped attitudes towards the woman manager or executive are to be eradicated. However, because women do not operate in a uni-sex vacuum but interact with men, the challenge for opportunity and change affects both sexes. In fact, the volume is more inclusive than its title and includes a reexamination of the family structure as well as employment patterns.

The major defect of the book is characteristic of publications that stem from seminars and conferences. Some of the material is repetitive

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1. As just one example, the University of Illinois Press has just established a Women's Study Division with a wide range of volumes. The selected bibliography in the Ginzberg volume itself illustrates the expanding literature of women and the work force. The rapid success of *Ms.* magazine, the voice of the new woman, is an example of the public interest and financial returns of "womens' lib."

in article form and basic material is "watered down" for oral presentation. The collected papers fail to achieve the status of a scholarly work but lack the impact of a "popular" presentation.

As discussed by Ginzberg in his introduction to the volume, there are presently approximately 31½ million women in the labor force of the United States and this figure represents over 40 per cent of all workers. In other words, approximately two-fifths or more of the current total labor force are women. Most of these women, however, are concentrated within a few so-called female job categories such as clerical and secretarial classifications, teaching, nursing and similar occupations.

While women comprise two-fifths of the total labor force, women workers account for only 15 per cent of total managerial employment (the subject of the symposium), 7 per cent of all physicians and 21 per cent of all professionals outside of the female oriented fields of education and health. A 1960 study estimated that women executives in business numbered approximately 26,000 or 2 per cent the number of males. The 16,205 women classified as executive employees in the Federal Civil Service in 1969 represented 5 per cent of all federal executives.² Thus, the problem presented at the outset of the symposium is that while the total number of women, married or unmarried, continues to increase in the national work force, the same increase has not occurred in the percentage of managerial or professional positions held by women workers.

Sociologist Valerie K. Oppenheimer of the University of California, another contributor to the volume, analyzes the statistics relating to the female labor force and the family life cycle. Thus, in 1900 if the so-called "average" woman worked at all during her lifetime—and not a great many did—it was before marriage and children. However by 1970, 50 per cent of American women aged 18 to 64 were in the labor force compared with 30 per cent in 1940 and 20 per cent in 1900. Even more important as an indicator of cultural change by 1970, 49 per cent of mothers of school age children were in the labor force and 49 per cent to 54 per cent of women between 35 and 59 years of age were employed.

These statistics are interesting and provocative as illustrations of the changes that have already occurred in the life style of the American woman. Beginning with the popular concept that employment

2. Wallace, *Sex Discrimination: Some Societal Constraints on Upward Mobility for Women Executives*, in CORPORATE LIB: WOMEN'S CHALLENGE TO MANAGEMENT 21 (1973) [hereinafter cited as CORPORATE LIB].

constitutes only a temporary stage in the life cycle of the woman, to be terminated by subsequent marriage and child rearing, the statistics clearly indicate that employment outside the home is no longer an interim or temporary stage but constitutes a permanent commitment for many women. In fact, these statistics would appear to support the theory that retirement from the labor market for purposes of child-birth and childrearing is the transitional stage and not the permanent life pattern of a large number of American women workers. Yet employers and particularly the corporate employer continue to regard the female employee as one pursuing a subsidiary and interim role in the work force.

The recent Supreme Court decision in *Frontiero v. Richardson*,³ summarized this earlier concept of female life styles.

Mr. Justice Brennan in an opinion, joined by Justices Douglas, White and Marshall, quoted at length from *Bradwell v. Illinois*,⁴ an 1873 decision of the Court on the status of women, as follows:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the ideas of a woman adopting a distinct and independent career from that of her husband. . . .

... [T]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁵

Justices Brennan, Douglas, White and Marshall discarded this example of "stare decisis," rejected separate standards for dependency allowance of male and female members of the uniformed services and reached the conclusion that classifications based upon sex, like classifications based upon race, alienage or national origin are inherently suspect and must therefore be subject to strict judicial scrutiny. However, Justices Powell and Blackmun and Chief Justice Burger were

3. 93 S. Ct. 1764 (1973).

4. 83 U.S. (16 Wall.) 130 (1873).

5. *Id.* at 141. In the same year as the decision in *Bradwell*, Susan B. Anthony was convicted for voting in a federal election in Rochester, New York. See Castle, *Susan B. Anthony, Reformer*, 59 A.B.A.J. 526 (1973).

reluctant to apply the "inherently suspect" doctrine to sex classifications. Justice Rehnquist dissented.

As further noted by Justice Brennan:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage.⁶

While *Bradwell* has not withstood the test of time, similar myths and stereotypes have been carried into the Twentieth Century. Even prior to 1900 when the accepted social female role, as noted by Justice Brennan, was the homebound woman, this role was primarily characteristic of the middle and upper classes. The poor or lower class woman has always been forced to work and the high status role of the "lady" was supported by household women workers from less privileged classes. The author Elizabeth Janeway, also a contributor to the volume, notes that the disappearance of domestic servants has had a profound effect on family life and the mobility of the wife-mother.

In rural America, women as well as children, played an economic role. Thus, the farm wife had duties and obligations in the operation of the farm. She frequently managed the chickens (now housed in farm factories), did canning and preserving, made the clothing and performed numerous other economic functions now performed outside the home.⁷ In the same manner the small business entrepreneur of the early twentieth century depended heavily on his wife and family to help operate the corner grocery store or local market. It is only as our society has become both conglomeratized and metropolitanized that the family no longer functions as an economic unit. The urbanized male has been absorbed into the larger productive system, the urbanized female has in many instances been left in a twilight zone.

Therefore the role of the wife-mother, which in a simpler society included many diverse roles of economic significance, became limited to that of a child-rearer and homemaker. As noted by contributor William Goode,⁸ a sociologist from Columbia University, we are perhaps the first civilization in the world that has decided that parents must transform the socialization of children into a 24 hour job on a

6. 93 S. Ct. at 1769.

7. Kuhn, *An Economist View of Women*, in CORPORATE LIB 63 (1973).

8. Goode, *Family Life of the Successful Woman*, in CORPORATE LIB 97 (1973).

one-to-one basis and has allocated this duty to one parent, the mother. Therefore in order to determine the proper role of women in the work force, we must also redefine the role of the individual woman as mother and parent and separate those duties which are a necessary and important part of the child rearing function from those which are household chores or tasks which can be performed by substitutes or other family workers.

However, before a conclusion is reached that all women are eager to leave the home in suburbia, a recent Louis Harris poll⁹ found that 44 per cent of the men interviewed supported efforts to strengthen or change women's status in society, but only 40 per cent of the women favored these efforts.

The female responses to this survey are even more interesting when broken down by type and class, *i.e.*, 58 per cent of women with post-graduate education favored a change in status but only 38 per cent of women who were limited to a high school education did so. Strong support for change in status also came from black women, who have traditionally been on the lowest rung of the labor force and there was a significant difference in positive responses from women under 30 as opposed to women 50 and over.

It is more difficult to chart a course for future change than to catalog the past inequities. While it is true that more and more women have joined the labor force and that each year the occupations of such women become more diverse, the largest cluster of women workers are still employed in the traditional female job categories with corresponding lower wage rates.¹⁰ These positions frequently lack promotional opportunities and are unacceptable to male workers. Further the various studies assert that despite Title VII of the Federal Equal Opportunity Act, discrimination remains a reality for the woman professional, the woman administrator or even the woman interested in upward mobility.

We all live in a world of stereotypes reinforced by the media around us. Judges are kindly, grey-haired father figures resembling the actor Lewis Stone in the Andy Hardy series of our youth. Corporate managers are tall, Ivy League types, well suntanned from the executive

9. L. Harris & Associates, *Virginia Slims American Women's Opinion Poll 4* (1971).

10. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 93 S. Ct. 2553, 2562 (1973). In reviewing want-ads for male and female workers, even the same job classification will carry a lower salary for female workers, *i.e.*, accountants, male—\$10,000—accountants, female—\$6,000.

golf course and appropriately clad in the grey flannel suit. Perhaps their hair is a little longer than their counterpart in the 1960's, but the image remains. Conversely, the corporate image of the female employee is still the cute little "chick" circa 25 with long blonde hair, a mini-skirt and a shorthand pad.

Despite Supreme Court decisions, these stereotypes which have been reenforced since childhood by movies, television and all of the persuasiveness of the mass media affect personnel practices. Further, the expectations of women, as noted by the various contributors to the Ginzberg volume are affected by these same stereotyped images. A current example of women in the public image is the recent twelve week Watergate television exposure, where there was only one woman witness. And that woman served as a secretary to one of the principals. In addition, none of the congressional participants are women. While this reviewer is not advocating or encouraging women to integrate Watergate, the paucity of women participants in those proceedings *in any capacity* illustrates the absence of women from decision making roles in the national administration. Just as black minorities have demanded a "just" media image to combat stereotypes, the same problem exists for the woman worker.

However, it is far easier to recognize the need for social change than to provide the specific nuts and bolts for that change. Also, while it is possible to document discrimination as applied to a total group, it is difficult to program a change which will apply or even be acceptable to half the population of the United States, many of whom find no fault with the status quo.

As previously stated at the outset of this review, the reexamination of even so narrow a question of expanded opportunities for women in management brings with it a much larger evaluation of the current status of the American middle class culture and the utilization of human resources. The issue is not solely a question of greater IRS deductions for the woman wage earner and adequate day care centers or even EEOC directives on equal opportunity. While the legal framework may be the first step in removing barriers to human growth and development, the impetus must ultimately come from the given individual, male or female. The energetic young women who are presently entering our graduate schools—whether of law or medicine or business or paleontology—have already established both a life style and aspirations different from their mothers in the same manner that the rising

generation of young men have expectations which differ from the goals of their fathers. The sharing of economic roles is not a liberation of one sex at the expense of the other, but in fact equalizes the burden which has statistically shortened the life of males and recognizes the adult status of both sexes.

In summary, women are reaching new levels of consciousness and aspirations, and this is probably the most central fact in the so-called women's liberation movement—corporate or otherwise. Unless people who are discriminated against are aware of the discrimination, there will be little pressure for social change. However, once such consciousness is reached institutional change becomes a possibility.

In conclusion, *Corporate Lib* contains references and summaries indicating the changing role of women in the work force and should be of interest to any lawyer called upon to write a "Brandeis Brief" in a sex discrimination case. There are numerous quotable summaries that should be persuasive to even the most male-oriented court or perhaps it is a book that a male lawyer should give to his wife and a female lawyer to her husband for their own "Brandeis Brief."

As stated by Charles DeCarlo, the President of Sarah Lawrence College:

People need to be able to get out of their ruts, to use their education and experience in creative ways, and to have the chance to re-examine their lives and contribute meaningfully to society. *That is, after all, the point of liberation.*¹¹

MARION K. FINKELHOR*

URBAN JUSTICE: LAW AND ORDER IN AMERICAN CITIES. By Herbert Jacob.† Englewood Cliffs: Prentice-Hall, 1973. Pp. viii, 145. \$6.95.

In the scant 138 pages of *Urban Justice: Law and Order in American Cities*, Dr. Herbert Jacob presents an excellent analysis of the administration of justice in urban America. Starting with a realization of the close relationship between justice and urban politics, Dr. Jacob

11. DeCarlo, *The Larger Stakes*, in *CORPORATE LIB* 139 (1973) (emphasis added).

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approaches his topic by breaking down the justice system into a number of component parts, then analyzing each in terms of their being influenced by city politics. The author discusses aspects of both civil and criminal litigation, although the emphasis clearly is on the criminal side. He discusses both types of litigation in terms of what he refers to as the dispositional process that does not occur in front of the public in courtrooms.

Early in *Urban Justice*, Dr. Jacob sets forth his underlying proposition that the majority of court cases, whether criminal or civil, are disposed of rather than adjudicated. That is to say, many cases are in large part decided by the time they are presented to the trial courts. This theory should be of no surprise to the urban bar, who are used to plea bargaining in criminal cases and negotiated settlements in civil cases. Dr. Jacob has set forth this theory in non-legal language so that it can easily be grasped by the layman.

Just as this dispositional concept is not a revelation to the bar, Dr. Jacob's analysis of how the various components of our system of justice are closely tied to city politics comes as no surprise to persons who frequent our courts, police stations and other legal institutions. The author has simply stated what these people have long known and what the rest of the public has long suspected.

While Dr. Jacob proceeds to discuss the various occupational and professional groups involved in the administration of justice, a considerable portion of this book is devoted to discussions of the involvement of police in the criminal justice system. While the discussion of the role of the police, and the tremendous discretion they possess is good, it also is regrettably incomplete. The police discussions in fact seem to be the weakest part of the book. This is not to say that what Dr. Jacob says is wrong; he simply does not say enough. Dr. Jacob correctly points out the tremendous power of the police in the initiation of criminal proceedings. He explains how the arrest power, while generally discretionary with the specific officer involved, may in fact be controlled or directed by city politics. He then goes on and alludes to police indiscretions and the effects of these indiscretions on certain segments of city populations.

Dr. Jacob fails to adequately discuss police abuses and their ramifications in terms of city politics. There is virtually no mention, for example, of the fact that officers who engage in brutality are virtually exempt from criminal prosecution at the local level, a fact clearly re-

lated to local politics.¹ While later in the book the author mentions in passing that federal authorities sometimes prosecute errant officers when local officials fail to do so, he does not indicate that this is indeed a rarity.² The hatred and disgust of minority groups and some young people for the police of some cities, as the result of unchecked police discretion, also is largely ignored, although the author does indicate the relatively low political influence of minorities.

There is also no discussion of the ease with which local politicians could, and in some places do, control police abuse by imposing some departmental discipline.³ On the contrary, Dr. Jacob notes the difficulties encountered by police administrators in controlling their officers and fails to adequately discuss the local political policies that lie behind this lack of control.

While the segments of the book dealing with police have some omissions, the sections on court personnel and the urban bar are thoughtfully written and offer readers an excellent insight into the roles of prosecutors, defense attorneys and judges in the dispositional process, as well as their relationships to city politics.

In a separate section of *Urban Justice*, Dr. Jacob discusses the availability of legal services in urban America. The author may be guilty of overstating the availability of legal services to America's poor in this section. While Dr. Jacob quite correctly points out that there now exist many poverty law specialists, he neglects to stress that many of them have difficulty keeping up with their enormous caseloads to the point that appointments are often backlogged for weeks. Dr. Jacob further fails to indicate that many marginally poor people who are just over government income guidelines are in the predicament of having no legal services available to them. These unfortunate people find themselves having too much income to qualify for free legal aid, but not enough to hire most private counsel.

1. See P. CHEVIGNY, *POLICE POWER* (1969).

2. For example, the first criminal cases in which police officers were charged with brutality in the United States District Court for the Western District of Pennsylvania were not initiated until November, 1972 despite the fact that various civil rights agencies had investigated hundreds of serious complaints in preceding years and publicly denounced widespread police misconduct.

3. For example, the Pittsburgh Bureau of Police apparently took a more serious approach towards police misconduct after some successful private litigation against Pittsburgh officers under 42 U.S.C. § 1983 (1970) in the western district court. Neighborhood Legal Services of Allegheny County, which at the time had a special unit which processed citizen complaints against police officers, reported a very significant decrease in complaint volume after the court successes and the imposition of more meaningful departmental misconduct investigations and sanctions.

In a conclusion, which is deserving of careful analysis by those who criticize police, prosecuting attorneys, and courts for compounding injustices, Dr. Jacob points out that the function of these groups is "... to contain and suppress rather than to ameliorate fundamental conditions...."⁴

Thus, as Dr. Jacob indicates, perhaps some of us expect too much from the actual participants in the justice system. Perhaps constructive criticism can do more to reform the sorry system described by Dr. Jacob if it is translated into effective political action involving the city politicians who really seem to be in control. Dr. Jacob seems to quietly suggest this throughout his work.

On the last few pages of *Urban Justice*, the author makes an attempt to correct an erroneous assumption of a majority of our citizens in these law and order times, that most criminal defendants leave court either innocent because of "legal technicalities" or with very light sentences if they have been found guilty or pleaded guilty. Dr. Jacob verifies what any criminal defense lawyer knows, namely that arrest alone is a serious punishment for an individual regardless of the ultimate verdict and sentence. The author quite correctly points out that many persons are summarily discharged from their jobs as soon as they are arrested and must live with the stigma of arrest records for the rest of their lives regardless of the ultimate verdict. These concluding remarks are closely related to another theory of Dr. Jacob's discussed elsewhere in the book that the de jure presumption of innocence has been replaced with a de facto presumption of guilt. This theory is easily verified by statistics on the high number of jailed persons awaiting trial as well as the popular law and order notion that people are not brought into criminal court unless they have done something wrong. Thus, Dr. Jacob indicates that in addition to whatever courtroom sanctions are applied to defendants, they are convicted and punished by public opinion long before trial.

While this book may provide few surprises for many urban lawyers, it offers a concise, accurate, and perhaps ominous analysis of justice, city politics, and the relationship between them, to the laymen and students for whom it was apparently written.

JOHN B. LEETE*

4. H. JACOB, *URBAN JUSTICE: LAW AND ORDER IN AMERICAN CITIES* 134 (1973).

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THE CONSCIENCE OF A LAWYER. By *David Mellinkoff*[†]. St. Paul: West Publishing Company, 1973. Pp. x, 304. \$6.50.

In these days of self-consciousness about the role of a lawyer in society, a book that addresses itself to the question of the lawyer's relationship to his client may help us, lawyers and non-lawyers alike, to come to a better understanding of what it is we expect of lawyers. One might quibble with Professor Mellinkoff's broad title as he focuses on only one of many situations giving rise to the uncomfortable questions of conscience that a lawyer must confront, if not answer, in his daily practice. The fact that there are other tough questions, however, does not lessen the insights we gain from Professor Mellinkoff's engaging and probing description of the celebrated *Courvoisier* case and the issues it raised.

One morning in 1840 Londoners awoke to the news that someone the preceding evening had rather cleanly slit the elderly Lord Russell's throat ear to ear. As trial by press continued during the following days Londoners learned of the substantial reward offered for discovery of the murderer, the investigation by the police indicating that the crime had been committed by someone in the house and the charge of murder brought several days later against Courvoisier, Lord Russell's Swiss valet. The evidence against Courvoisier was entirely circumstantial and the motive for the murder remained obscure. No murder weapon could be found. Nonetheless, in what seems remarkably short time to the American reader (six weeks), Courvoisier was preliminarily examined, indicted and brought to trial.

Until a short four years before his trial, Courvoisier could have looked forward to having the trial judge serve as his counsel. This anomaly of the English criminal system was made stronger by the fact that were Courvoisier charged with a misdemeanor he would have been entitled to counsel (if he could afford it). Yet where he was charged with a felony and his life was at stake he ought not, according to the words of Lord Chief Justice Sir Edward Coke 200 years before, be convicted without proof "so clear and manifest, as there can be no defence of it", and "the court ought to be instead councill for the prisoner, to see that nothing is urged against him contrary to law and right."¹ Passage of the Prisoners' Counsel Bill in 1836 meant the termination of this fiction and entitled Courvoisier to defense counsel, in this case a flamboyant, successful Irish barrister, Charles Phillips.

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1. D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 48 (1973).

What raises the trial from the ordinary run-of-the-mill English trial where His Lordship is done in by his servant is that just before Phillips' closing address to the jury, Courvoisier, for some inexplicable reason, confessed his guilt to Phillips. He advised Phillips, however, that he had no intention of changing his plea to guilty but rather instructed his lawyer "to defend me to the utmost."² Phillips' initial reaction was to abandon the case, but his assistant resisted this approach and as a compromise the two of them approached one of the two judges hearing the case in order to obtain his advice. Why Phillips felt this was a proper thing to do in the midst of a trial is difficult to comprehend. The judge, not at all pleased at the position he was placed in, made clear to Phillips that he was bound to follow his client's instruction and "to use all fair arguments arising on the evidence."³

What made the *Courvoisier* case a nagging question in the otherwise illustrious career of Charles Phillips and what has made the case so controversial and interesting since is the nature of the Phillips' remarks to the jury. Notwithstanding that he had no doubt of the guilt of his client, Phillips, through disclaimers familiar to any trial attorney, raised questions about the innocence of the two housekeepers who together with Courvoisier had lived with Lord Russell. He accused (probably accurately) certain policemen of having earned "the wages of blood"⁴ by creating evidence of Courvoisier's guilt in order to obtain the reward. Finally, the witness whose testimony was the most damaging to Courvoisier, who had come forward simply on the basis of her civic duty to tell what she knew, was accused of running a disreputable inn and her relations with her husband were held up to public exposure.

Charles Phillips' eloquence, overzealous though it was, was for naught. One hour and 25 minutes later the jury returned a guilty verdict. Courvoisier was sentenced to "be hanged by the neck until you be dead."⁵ Before he died, Courvoisier confessed to the crime. Nine years after his death, however, his lawyer's conduct was very much the subject of debate:

And what is the essential difference [asked the editor of *The Examiner*], in point of sentiment between aiding and assisting by such means in the escape of an assassin from the hands of justice,

2. *Id.* at 133.

3. *Id.* at 140.

4. *Id.* at 114.

5. *Id.* at 125.

and aiding and assisting in his escape before he falls into the hands of justice.⁶

What would we Twentieth Century American lawyers do in Phillips' unenviable position? Knowing that our client is guilty could we continue to represent him? Does it depend on when we learn of the guilt? Are we his partisan? The 1972 revision of the Code of Trial Conduct of the American College of Trial Lawyers states that a "confidential disclosure of guilt alone does not require a withdrawal from the case, but [the lawyer] should never offer testimony which he knows to be false."⁷ What about casting inferences of guilt on others known to be innocent? "The crime charge should never be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of such person's probable guilt."⁸

Most lawyers will agree that it is not the lawyer's duty to determine the guilt or innocence of his client. His duty is to present the facts in the light most favorable to his client and let the fact-finder make the determination. Thus, under our system of advocacy, "truth" is obtained. It is not, as Professor Mellinkoff points out, truth in the absolute sense. In fact, given the well-advertised fallibility of human beings, it may not be truth in any sense. Professor Mellinkoff and most other lawyers are firm believers in our adversary system, but one sometimes wonders if the system really does all that we say it does. A day's experience in most criminal courts in this country would probably leave most observers in doubt whether the adversary system is even at work let alone working well.

What most lawyers in this country probably will not agree upon is whether the lawyer must "believe" in his client's cause before accepting his case or whether his duty is served by acting as a professional agent to further his client's cause regardless of whether or not he believes in the cause. Professor Mellinkoff argues the latter and I would hazard the guess that a majority of American lawyers would agree with him. Otherwise, they would ask, who would be willing to represent a "bad" cause? Would not some individuals be denied legal representation entirely? Professor Mellinkoff argues:

So the questions for the lawyer are not 'Shall I defend a guilty man?', not 'How can I argue for acquittal if I "know" he is guilty?'

6. *Id.* at 187.

7. *Id.* at 217.

8. *Id.*

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The lawyer asks himself, 'What is this man entitled to under the law?', 'Under the established system of justice is there the required proof that this man is to be punished?' Neither judge nor jury, legislator nor moralist, the lawyer is required to insist that his client be given what he is entitled to under the law, and that he not be punished unless there is the proof that our system of justice requires.⁹

Yet, for all the force of this position, are there not lingering doubts? The fact that we lawyers generally do not ask Professor Mellinkoff's questions, but rather the wrong questions may or may not say something about the principle. How is this approach to be applied in the civil area? What if the lawyer knows that his client is "wrong?" Do we still ask "What is this man entitled to under the law?" or do we have the duty in some cases broader than merely representing the interests of our client? Most lawyers would say the client is entitled to a defense and it is for the courts to decide the merits. But surely there are cases where the "wrong" is rather clear and it is hard to feel that much of a service is being done to anyone to argue the contrary. What happens where the "wrong" runs afoul of a contrary "public interest?" Lawyers are not policemen as to the clients' behavior; but sometimes is there not a point at which the lawyer has to tell the client that he can no longer advise him if he pursues a certain line of conduct? The Securities and Exchange Commission has recently gone a step farther and urged that in a particular transaction the attorneys, aware of their clients' impending violation of the securities laws, should have urged their clients to desist, and, failing that, should have notified the Commission of the situation.

None of this is to deny the force of Professor Mellinkoff's argument nor the importance of his book. It is only to suggest that rarely has there been a more critical time in the nation's history for lawyers to be concerned about their profession and their consciences. We are indebted to Professor Mellinkoff for adding perspective to that concern.

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9. *Id.* at 158.

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